Filed 7/28/09 Benjamin, Weill & Mazer v. Copansky CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

BENJAMIN, WEILL & MAZER,
Plaintiff and Respondent,
v.
PAUL COPANSKY,
Defendant and Appellant.

A122623

(Contra Costa County
Super. Ct. No. C0601833)

Defendant Paul Copansky, appearing in propria persona on appeal as he did in the trial court , appeals from a judgment entered on January 2, 2008, in favor of plaintiff Benjamin, Weill & Mazer (Benjamin) and a postjudgment order entered on August 26, 2008, denying his motion to set aside the judgment as void. Benjamin filed a motion to dismiss the appeal on the ground that the notice of appeal, filed August 29, 2008, was untimely. We deferred ruling on the motion to the decision of the appeal on the merits. Having reviewed the record, we conclude that the notice of appeal was not timely as to the judgment and we shall therefore grant the motion to dismiss the appeal insofar as it challenges the judgment. The appeal is timely, however, with respect to the order denying the motion to void the judgment, which we shall affirm.

Background

In October 2002, Copansky hired Benjamin to perform legal services. Three weeks later Copansky terminated Benjamin's representation, leaving $59,410.81 in legal bills unpaid. In September 2006, Benjamin filed the present action for breach of contract seeking to recover the unpaid legal fees. Copansky acknowledges that in November 2002,

Benjamin sent him a notice of his right to seek arbitration as required by the arbitration clause in the retainer agreement. Copansky did not file a petition to compel arbitration or assert his right to arbitration as an affirmative defense in his answer. Instead, he filed a cross-complaint seeking damages for breach of contract, fraud, and legal malpractice.

The case was tried to the court in October 2007. It does not appear from the record that Copansky requested a jury trial or objected to the bench trial. On January 2, 2008, the court entered judgment in favor of Benjamin for $89,738.09. A copy of the judgment was mailed to Copansky on the same day.

On July 22, 2008, following the denial of several intervening motions for reconsideration, Copansky filed a motion entitled "Defendant's Emergency Motion to Void Judgment Obtained by Fraud and Render[ed] in Violation of Paul Copansky[']s Disability and Constitutional Rights." Copansky offered the following grounds, among others, for voiding the judgment: "Plaintiff's agreement for legal services is unlawful and unenforceable, as it required defendant to give up his constitutional right to a jury trial and appeal via a pre-dispute contractual waiver in plaintiff's agreement. [¶] . . . [¶] Plaintiff's claims against defendant were against the law and barred by the state bar arbitration rules and codes."

At a hearing on August 26, 2008, the motion was denied. The court explained, "Mr. Copansky is correct that insofar as a judgment is void that judgment can be set aside . . . at any time. So, as to that argument that the judgment is void, the court finds that that argument lacks substantive merit. There are a number of reasons why it lacks substantive merit, but perhaps most important is I think Mr. Copansky doesn't appreciate the distinction between a void provision within a contract and a void judgment. Insofar as Mr. Copansky is making any other arguments which appear to the court to be the primary thrust of the motion, Mr. Copansky is simply arguing that the judgment was incorrect for various reasons that are lesser reasons than the judgment being void. As to those other arguments, . . . [t]he motion is untimely. There are various procedures for timely attacking the judgment, including filing a motion for new trial or similar types of posttrial motions. All those deadlines have long passed . . . in addition to which at least some of

these arguments have been raised in previous post-judgment motions, including a motion for reconsideration and a . . . previous motion to void the judgment."

On August 29, 2008, Copansky filed a notice of appeal purporting to appeal from the judgment and the August 26 order denying his motion to void the judgment.

Discussion

1. Timeliness of the Notice of Appeal

California Rules of Court, rule 8.104 provides in relevant part: "Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of: [¶] (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled 'Notice of Entry' of judgment or a file-stamped copy of the judgment, showing the date either was mailed; [¶] (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or [¶] (3) 180 days after entry of judgment." Rule 8.104 continues, "[N]o court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal."

The superior court clerk mailed a copy of the judgment to Copansky on January 2, 2008. Copansky's notice of appeal was filed more than seven months later on August 28, 2008. Accordingly, the notice of appeal is untimely insofar as it seeks review of the judgment, and the motion to dismiss the appeal from the judgment must be granted.

The order denying Copansky's motion to vacate the judgment on the ground that it is void for lack of jurisdiction is a separately appealable order. (*In re Marriage of Brockman* (1987) 194 Cal.App.3d 1035, 1040-1041.) Under rule 8.104(a), the notice of appeal, filed within 60 days of notice of the order, was timely as to this order.

2. Motion to Void the Judgment

"Once six months have elapsed since the entry of a judgment, a trial court may grant a motion to set aside that judgment as void only if the judgment is void on its face." (*Dill v. Berquist Construction Co*. (1994) 24 Cal.App.4th 1426, 1441; see also *Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239 ["A judgment void on

its face because rendered when the court lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant, is subject to collateral attack at any time"].) A judgment is void on its face only when the record of the judgment itself affirmatively shows the court was without jurisdiction to render the judgment. (*Dill v. Berquist Construction Co. , supra*, at p. 1441 [" 'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll' "]; 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 12, p. 595 ["A judgment 'void on its face' may be collaterally attacked when the defects may be shown without going outside the record or judgment roll"].)

Copansky argues that Benjamin was "barred from suing [Copansky] and [the] trial court was devoid of venue and subject matter jurisdiction to make any rulings in this case" because the retainer agreement contained an arbitration clause. "Arbitration is a recognized and favored means by which parties expeditiously and efficiently may settle disputes which might otherwise take years to resolve. [Citations.] But this right may be lost, as any contractual right which exists in favor of a party may be lost through a failure properly and timely to assert the right. A right to compel arbitration is not, unless expressly provided for in the agreement, self-executing. If a party wishes to compel arbitration, he must take active and decided steps to secure that right, and is required to go to the court where plaintiff's action lies. [Citations.] In other words, a right to arbitrate may be waived." (*Gunderson v. Superior Court* (1975) 46 Cal.App.3d 138, 143, disapproved on another ground in *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 185-186.)

Copansky unquestionably waived his right to arbitrate. He did not move to compel arbitration or assert a right to arbitrate in his answer or at any time prior to entry of judgment. To the contrary, he filed a cross-complaint seeking to recover damages in the court action. (See *Gunderson v. Superior Court*, *supra*, 46 Cal.App.3d at p. 144 [waiver of right to arbitration may be found when party fails to assert right as an affirmative defense in his or her answer, files a counterclaim or waits too long to assert the right];

Fagelbaum & Heller LLP v. *Smylie* (2009) 174 Cal.App.4th 1351.) Hence, the court neither erred nor lacked jurisdiction to proceed with the action as a result of its failure to enforce the arbitration agreement.

Copansky also asserts that the superior court "exceeded [its] jurisdiction by rendering a judgment against [him] that deprived him of his constitutional right to a jury trial." As with the right to arbitrate, the right to a jury trial may be waived by a party's failure to timely assert it. Under Code of Civil Procedure section 631, subdivision (d) a civil litigant may waive the right to "trial by jury in any of the following ways: [¶] . . . [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to deposit with the clerk, or judge, advance jury fees as provided in subdivision (b)." The record does not reflect that Copansky made a demand for a jury trial or deposited jury trial fees. Instead, he proceeded without objection through a court trial. "[I]t is well established that '. . . a party cannot without objection try his case before a court without a jury, lose it and then complain that it was not tried by jury.' " (*Taylor v. Union P. R. Corp*. (1976) 16 Cal.3d 893, 900.) Accordingly, the trial court did not deprive Copansky of his right to a jury trial.

Thus, the judgment was not, as Copansky asserts, entered in violation of "binding appellate and Supreme Court authority." Moreover, there is nothing in the record to support his additional contention that the judgment was entered as a result of fraud and deception by Benjamin. In short, the trial court did not lack jurisdiction to enter its judgment, and the motion to set it aside as void was properly denied.

Disposition

The appeal from the judgment is dismissed. The order denying the motion to void the judgment is affirmed. Respondent shall recover its costs on appeal.

_____
Pollak, Acting P.J.

We concur:

_____
Siggins, J.

_____
Jenkins, J.